

Nuclear Weapons: Strengthening the International Legal Regime

NUCLEAR WEAPONS:
STRENGTHENING THE
INTERNATIONAL LEGAL REGIME

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TABLE OF CONTENTS

| | |
|---|-----------|
| Introduction | ix |
| <i>Ida Caracciolo, Marco Pedrazzi and Talitha Vassalli di Dachenhausen</i> | |
| Foreword | xi |
| <i>Umberto Leanza</i> | |
| Part I Nuclear Disarmament and Non-Proliferation: Strengthening Treaty Obligations | |
| 1 The Limitations of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons: International Law in Support of Nuclear Disarmament | 3 |
| <i>Ida Caracciolo</i> | |
| 2 On Certain Legal Issues Arising from Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons | 15 |
| <i>Marco Roscini</i> | |
| 3 [Dis]armament and (Non)proliferation in International Law: The Effectiveness of UN Sanctions in the Case of North Korean Nuclear Programme | 23 |
| <i>Jonathan Black-Branch</i> | |
| 4 Grey Zones in the System of the Treaty on the Non-Proliferation of Nuclear Weapons: The Iranian Case as Paradigm | 33 |
| <i>Silvia Angioi</i> | |
| 5 Garantir la nature exclusivement pacifique du programme nucléaire de l'Iran (le Plan d'action conjoint du 24 novembre 2013) | 45 |
| <i>Djamchid Momtaz</i> | |
| 6 EU Ambivalence on Nuclear Disarmament and Non-Proliferation: Opacity and Obsolescence of the EURATOM Treaty | 75 |
| <i>Francesca Graziani</i> | |
| 7 A Middle East Weapons of Mass Destruction Free Zone | 85 |
| <i>Cosimo Risi</i> | |

TABLE OF CONTENTS

| | | |
|---|---|------------|
| 8 | Towards a Denuclearized World: Is the Mediterranean Area Eligible? | 91 |
| | <i>Aldo Amirante</i> | |
| 9 | Cyber Attacks v. Nuclear Proliferation | 103 |
| | <i>Annachiara Rotondo</i> | |
| 10 | Nuclear Disarmament and Non-Proliferation: Comparison of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons with the 2013 Arms Trade Treaty | 109 |
| | <i>Daniela Marrani</i> | |
| Part II Nuclear Disarmament and Non-Proliferation: Strengthening IAEA Safeguards | | |
| 11 | Strengthening the Role of the IAEA as a Step towards a World Security Order | 117 |
| | <i>Talitha Vassalli di Dachenhausen</i> | |
| 12 | Strengthening the IAEA Verification Capabilities | 129 |
| | <i>Sonia Drobysz and Andreas Persbo</i> | |
| 13 | Intelligence Collection in the IAEA Safeguards Implementation | 139 |
| | <i>Pierluigi Salvati</i> | |
| 14 | IAEA-CTBTO-OPCW Cooperation: A Chance of Reinforcing the IAEA Verification Regime | 151 |
| | <i>Rita Mazza</i> | |
| 15 | Nuclear Cooperation and the US 123 Agreements | 165 |
| | <i>Anna Di Lieto</i> | |
| Part III Strengthening Legal Obligations against Nuclear Proliferation by Non-State Actors | | |
| 16 | The Role of the Security Council in the Framework of International Efforts to Fight Proliferation by Non-State Actors | 179 |
| | <i>Marco Pedrazzi</i> | |
| 17 | Ensuring Compliance with Non-Proliferation Obligations by States and Non-State Actors | 191 |
| | <i>Dieter Fleck</i> | |

| | | |
|-----------|---|------------|
| 18 | Renforcer les obligations juridiques contre la prolifération nucléaire des acteurs non étatiques | 199 |
| | <i>Serge Sur</i> | |
| 19 | Protecting Nuclear Material: Merits and Demerits of the 1980 Convention on the Physical Protection of Nuclear Material (and Its Amendment) | 211 |
| | <i>Gabriella Venturini</i> | |
| 20 | Curbing Illicit Trafficking in Nuclear and Related Materials: Legal Regime and Challenges to Proliferation | 223 |
| | <i>Christian Ponti</i> | |
| 21 | The Convention on the Suppression of Acts of Nuclear Terrorism | 235 |
| | <i>Laura Paredi</i> | |
| 22 | The European Union, Non-Proliferation and Non-State Actors | 247 |
| | <i>Erica Brandolino</i> | |
| | Index | 259 |

INTRODUCTION

*Ida Caracciolo**, *Marco Pedrazzi*** and *Talitha Vassalli di Dachenhausen****

This volume contains the results of a research project submitted for funding to the Ministry of Education, University and Research in 2009 and financed in 2011 as research project of national interest (PRIN No. 2009LAK333). The project involved three working groups, from the Department of Political Science of the University of Naples 2, the Department of Political Science of the University of Naples 'Federico II' and the Department of International, Legal, Historical and Political Studies of the University of Milan, interested in different legal aspects of the general topic of nuclear disarmament and non-proliferation.

In particular, the research group of the University of Naples 2 focused on the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT) in order to study short- and long-term practical and dynamic solutions, also on the global and regional level, for strengthening the obligations of the NPT above all towards nuclear disarmament.

The research group of the University of Naples 'Federico II' analyzed the IAEA safeguards system in the perspective of its reinforcement and of the effects on the IAEA's role.

The research group of the University of Milan investigated the issue of the strengthening of the nuclear non-proliferation regime in relation to non-state actors and organizations, by referring to the most relevant treaties and other legal instruments specifically designed to prevent and combat the circulation of nuclear weapons among non-state actors, particularly terrorist groups, as well as the initiatives undertaken by the EU.

The results of the research were presented to several major Italian and foreign scholars, well known for their studies in the field of nuclear non-proliferation and disarmament in an international conference on *Nuclear Disarmament and Non-proliferation: Strengthening Treaty Obligations, IAEA Safeguards and Measures Countering Nuclear Terrorism*, held in Naples on 26-27 October 2013.

The conference proved to be a very positive experience. Different interpretations, evaluations, and reflections on the articulation of the nuclear non-proliferation and disarmament system were discussed, and a fruitful exchange of views between academics and practitioners dealing daily with the application and implementation of this system took place.

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Concerning the legal role the NPT can still play, the conclusion is that its structural and procedural limits did not deprive it of authority and legitimacy. The NPT is still considered by states and the United Nations the pillar within nuclear disarmament and non-proliferation; its rules prove to be in general acceptable and states comply with them. The Iranian case is paradigmatic to that end. However, what emerges is the tendency of states and of the UN Security Council to try to overcome the weaknesses of the NPT through various heterogeneous legal means, *inter alia* from detecting a possible customary nature of some NPT rules, to the negotiations of specific agreements to guarantee its compliance as well as to the regionalization of the obligation towards nuclear disarmament. The approach is pragmatic and leaves in the background the rather impossible task of reforming the NPT system.

With reference to the IAEA, the scientific contributions concern the reinforcement of the IAEA safeguards system from the “inside”, namely, the evaluation of the evolving verification capabilities and tools. And from the “outside”, namely, by looking at both the IAEA cooperation with other international organizations dealing with disarmament and the bilateral agreements on peaceful nuclear cooperation as well as by focusing on the reinforcement of the IAEA role also in the light of the increased relevance of international security and control in the contemporary international legal order.

As far as the nuclear proliferation by non-state actors is concerned, a patchwork of rules and mechanism deals with the fight against the proliferation of nuclear weapons towards, from, and among non-state actors, and several bodies encompass such a fight among their tasks. Many positive steps have been undertaken in the perspective of a general assessment; however, a series of loopholes remain, in terms of limited coverage of some legal instruments, of lack of coordination among various measures and competences, of absence or inadequacy of compliance by some states, and of limited enforcement capacities. All these are fields in which improvements may be expected in the near future.

We believe it is important to treasure all the results achieved; the volume therefore contains both the results of the research project and the outcomes of the Naples Conference, following the logic and structure of the latter. Thus the book is a synthesis of various scientific points of views on the effectiveness, limits, adaptation, challenges, and future possibilities of the regime relating to the control of nuclear weapons.

FOREWORD

*Umberto Leanza**

I was for ten years – from 1994 to 2003 – head of the Legal Service of the Italian Ministry for Foreign Affairs, and therefore I represented Italy before the International Court of Justice (ICJ) in the proceedings which led to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996. The Italian counsels were well aware of how awkward the topic under scrutiny by the Court was but at the same time they were convinced that all the risks and implications connected with a possible utilization of nuclear weapons had been thoroughly evaluated by the governments that intervened in the proceedings before the Court.

The Italian involvement in the proceedings was very intense. It stemmed from the importance of the opinion requested to the Court due to an uncertain development of customary international law and to the difficulties to ascertain it; to the existence of conventional rules focused on nuclear non-proliferation rather than to disarmament; and to the inherent political relevance of the request from the UN General Assembly.

Indeed, the fact that the topic presented numerous grey zones emerges from the dissenting opinions of some judges of the Court, in favour of a more anti-nuclear approach, and from the long time taken by the Court to render the advisory opinion, as well as from the organization of all utilized arguments and deductions with a wide but not always clear motivation. More than ever, the ICJ judges – because of the strong political relevance of the case – decided to follow a reasoning which would permit a broad and advanced consent on the different points, and that would be logically persuasive in order not to deprive the *dicta* of authority.

At the same time, the legal position of Italy in the proceedings before the ICJ was strongly influenced by its particular position: Italy is a non-nuclear weapons state following the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT) but also a member of a military alliance – NATO – which includes nuclear weapons States. The latter fact demanded the Italian participation to the proceedings in order to present to the Court a wide range of legal reconstructions not limited to those of the well-known anti-nuclear states.

Within this context, the Italian position was that any answer from the Court would inevitably have a political value, while the role of the advisory opinions is that of facilitating

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the work of the international community and, more generally, of international relations. The Italian counsels also added that an opinion on such a theme might have seriously hindered the progress on nuclear disarmament negotiations. Such a risk was qualified on the part of Italy as a convincing motivation to persuade the Court to abstain from answering. The Court itself had already taken this possibility into consideration in the advisory opinions of 23 October 1956 in the case of the *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against Unesco* and of 15 December 1989 in the case of the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*.

Another key point of the Italian juridical arguments, in light of the international law in force, was in favour of a distinction between the ban on the use of nuclear weapons and the threat of its use. In this sense, the Italian position underlined how the ban on the use of nuclear weapons was included in the general ban on the use of armed force as provided in Article 2.4 of the UN Charter, taking into account the exceptions to such ban as indicated in Article 42, which allows the United Nations to take up actions implying the use of armed force against one or more states in cases of threats to the peace, breach of the peace or act of aggression, and in Article 51, which allows the exercise of the inherent right to individual and collective self-defence in case of an armed attack.

According to the Italian counsels there was, on the other hand, no definite general rule in international law concerning the threat of nuclear weapons. Indeed, numerous UN General Assembly resolutions are at the same time proof and consequence of the lack of general rules. This is confirmed also by the fact that all the resolutions had been adopted on a majority vote. Instead, had they been adopted by consensus, it would perhaps have been possible to speak of at least the beginning of a development of customary rules, aimed at banning or limiting the use or the threat of nuclear weapons. In other words, the same resolutions could have been considered manifestations of a well-defined *opinio iuris*, able to lead to the material repetition of behaviours (*diuturnitas*).

A further focal point of the Italian position both in the written statements and in the oral statements (and a point that was accepted by the Court) regarded the exclusion of any possibility of analogical application of all those conventional dispositions of the 'classic' right to wage war elaborated in the conferences of 1899, 1907 and 1949, in which the use of conventional weapons is banned. Indeed, the prohibitions stemming from these norms have a specific character, and nuclear weapons, due to their characteristics and effects, cannot be assimilated to poisonous weapons or to asphyxiating weapons.

In this respect, the Italian counsels decided to mention and list in the oral statements, in favour of the above-mentioned conclusion, the numerous resolutions of the UN General Assembly, addressed to the Conference for the Review of the Treaty on the Non-proliferation of Nuclear Weapons (NPT Review Conference) and aiming at facilitating an acceleration towards appropriate and concrete prevention measures for nuclear war.

Finally, the Italian counsels expressed the hope that the quinquennial NPT review conferences would propose rules that would effectively guarantee that nuclear weapons were never used.

After almost 20 years since the advisory opinion by the ICJ, it is important that scholars ask again the question of what is the current state of international law concerning nuclear non-proliferation and disarmament. A reflection on this theme is evermore urgent considering that the issue of nuclear disarmament has recently been re-proposed to the ICJ albeit in different terms from those that had led to the advisory opinion of 1996. The Marshall Islands in fact presented an application instituting proceedings against nuclear states (among which are Great Britain, India and Pakistan) to the Court, raising *inter alia* the issue of the crystallization of customary rules on nuclear disarmament.

This volume presents a comprehensive analysis of the most up-to-date aspects of nuclear non-proliferation and disarmament, through a wide collection of highly interesting contributions by Italian and international scholars.

The reader will certainly find this volume a stimulating read, not only with regard to the more 'classic' themes, such as the juridical value and relevance of the NTP, the effectiveness of the verifications by the IAEA and the ways that these can be reinforced, as well as the role of the UN Security Council, but also the more 'modern' themes, deriving from the current practice of international relations, such as the Iranian nuclear programme and the nuclear threat coming from terroristic groups, and prevention and control mechanisms.

Furthermore, the volume also focuses on specific legal issues, arising from the strong political instability in certain areas, such as the Mediterranean, or the potential improvements in the nuclear non-proliferation and disarmament system deriving from the Euratom action or by possible synergies of the IAEA with the organizations that address disarmament with respect to other weapons of mass destruction.

Notwithstanding the failure of the 2015 NPT Review Conference, I hope that the commitment by the states that are part of the NPT for the creation of a world free of nuclear weapons will be honoured both in words and in practice, so that international stability based on security for all becomes a closer reality.

